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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte MICHAEL J. WARING and ELIZABETH JACQUES

Appeal 2010-012392
Application 09/341,821
Technology Center 1600

Before DONALD E. ADAMS, DEMETRA J. MILLS, and
RICHARD M. LEBOVITZ, *Administrative Patent Judges*.

LEBOVITZ, *Administrative Patent Judge*.

DECISION ON APPEAL[1]

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[1] The two-month time period for filing an appeal or commencing a civil action, as recited in 37 C.F.R. § 1.304, or for filing a request for rehearing, as recited in 37 C.F.R. § 41.52, begins to run from the "MAIL DATE" (paper delivery mode) or the "NOTIFICATION DATE" (electronic delivery mode) shown on the PTOL-90A cover letter attached to this decision.

This is a decision on the appeal under 35 U.S.C. § 134 by the Patent Applicant from the Patent Examiner's final rejection of the claims. The Board's jurisdiction for this appeal is under 35 U.S.C. § 6(b). We affirm.

Background

The claims involve a self-sealing barrier aerosol vessel comprising multiple doses of a wound gel. Claims 5, 6, 8-10, 14, 15, and 18-20, which are all the pending claims, stand rejected under 35 U.S.C. § 103(a) as obvious in view of the '081 publication,[2] the '521 patent,[3] and the '223 patent.[4] Claim 5 is representative and reads as follows:

> 5. A self-sealing barrier aerosol vessel, under positive pressure, which minimizes contamination, containing multiple doses of a wound gel for the treatment of wounds wherein the gel comprises:
>
> (a) from about 0.05% to 10% by weight of a natural gelling agent;
>
> (b) from about 1.0 % to 10% by weight of a hydrocolloid;
>
> (c) from about 5.0% to 30.0% by weight of an alkylene glycol; and
>
> (d) at least 50% by weight of water.

Issue

Did the ordinary skilled worker have a reason to use the aerosol vessel described in the '521 patent for the gel disclosed in the '081 publication?

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[2] Court, EP 0 666 081 A1 published Aug. 9, 1995.
[3] Laauwe, U.S. Patent No. 3,788,521 issued Jan. 29, 1974.
[4] Jass, U.S. Patent No. 3,976,223 issued Aug. 24, 1976.

Principles of Law

> Two criteria are relevant in determining whether prior art is analogous: "(1) whether the art is from the same field of endeavor, regardless of the problem addressed, and (2) if the reference is not within the field of the inventor's endeavor, whether the reference still is reasonably pertinent to the particular problem with which the inventor is involved." *Comaper Corp. v. Antec, Inc.*, 596 F.3d 1343, 1351 (Fed. Cir. 2010) (quoting *In re Clay*, 966 F.2d 656, 658-59 (Fed. Cir. 1992)). Whether a reference in the prior art is "analogous" is a fact question. *In re Clay*, 966 F.2d at 658.

Wyers et al. v. Master Lock Co., 616 F.3d 1231, 1237 (Fed. Cir. 2010).

Findings of Fact (FF)

Specification

The Specification discloses:

1. The "invention provides a barrier aerosol vessel containing a wound gel" (Spec. 2: 12-13).

2.

> Aerosol barrier vessels are of the type where the product to be dispensed and the pressure generating media, ie [sic] the propellant, are maintained in isolation through separation on opposite sides of a barrier. This has many advantages in the context of wound gels. Firstly, because there is positive pressure in the container, the vessel can be made to be self-sealing. This aids maintenance of product sterility.

(*Id.* at 2: 14-21).

3.

> In a second variant of an aerosol barrier vessel, a flexible collapsible inner container is affixed within an outer container opening either to the aerosol discharge valve or to the bead of the container opening. Patents which illustrate a barrier vessel

> of this variant are described in US 3,788,521 [the cited '521 patent], 3,896,970 and 4,067,499.

(*Id.* at 3: 9-14.)

'521 Patent

4. The '521 patent describes an aerosol package that comprises a rigid container, a dispensing valve, and a collapsible flexible container inside the rigid container (Abstract).

5. The collapsible flexible container contains an extrudable liquid product in which a liquified compressed gas is dissolved or dispersed (*id.*).

6. A liquified compressed gas propellant, with a vapor pressure higher than that of the product's liquified gas, is in the rigid container outside of the flexible container (*id.*).

7. The product is extruded under pressure of the propellant through the valve (*id.*).

8. The '521 patent describes its aerosol package for shaving cream and hair coloring foam formulations (col. 7, ll. 11-18), but such uses are not described in the Abstract or the "Summary of the Invention."

'223 Patent

9. The '223 patent describes the use of the aerosol package to dispense a "strippable gel bandage" for burn treatment (*id.* at col. 9, l. 16 to col. 10, l. 29).

Analysis

The claimed invention is directed to a "self-sealing barrier aerosol vessel" containing multiples doses of a wound gel. The gel comprises four

components: a natural gelling agent, a hydrocolloid, an alkylene glycol, and water.

The only difference between the claimed invention and the '081 publication is that the gel of the claimed invention is packaged in a self-sealing barrier aerosol vessel, but the same gel in '081 is in the form of a dressing (Ans. 3-4). However, the '521 patent describes a pressurized container (FF3-FF7) acknowledged in the Specification to be an aerosol barrier vessel (FF3). Based on the description of self-sealing in the Specification (FF2), the Examiner found that the '521 container was also self-sealing (Ans. 4). The Examiner concluded that it would have been obvious to place the wound composition of the '081 publication into the '521 barrier aerosol vessel, "motivated by the teaching of US '521 that the discharged product from such as [sic, an] aerosol [vessel] has a uniform density and maintained a predetermined physical characteristic all the life of the package" (*id.* at 6). The Examiner also found that the positive pressure inside the self-sealing barrier vessel would maintain sterility of the product in the vessel (*id.*).

Appellants contend:

• the container in the '223 patent is not self-sealing, only the lower chamber of the '223 patent is pressurized; the '223 patent does not avoid the problem of gel contamination during use (App. Br. 4); and

• the '521 patent does not teach delivering a gel and has different requirements from the claimed invention; the skilled worker would not have put a wound gel in the hair coloring and shaving cream container of the '521 patent (*id.* at 4-5).

Appellants' arguments are not persuasive. The Examiner cited the '223 patent for its teaching of a wound gel in an aerosol container (FF9), providing motivation to have placed the '081 gel in the aerosol vessel of the '521 patent (Ans. 5). The Examiner's determination that "the art recognized at the time of the invention that wound dressing gel can be delivered from an aerosol package" was therefore supported by the teachings of the '223 patent (*id.*).

The '521 patent taught a self-sealing aerosol barrier package as in claim 5. Consequently, Appellants' argument about the differences between the claimed aerosol package and that of the '223 patent are not persuasive because the latter patent was relied upon for motivation, not the specifics of the claimed container. Moreover, because the '521 aerosol barrier device utilized positive pressure to extrude its product (FF6 & FF7), the Examiner reasonably found it would avoid contamination of the product inside the vessel (FF2; Ans. 5).

We are not persuaded that the '521 patent is deficient because it does not describe delivering a gel and because it is non-analogous art. The '521 patent discloses shaving cream and hair color formulations in its aerosol package (FF8), but its disclosure is not limited to these uses. Rather, there is a more general description of the aerosol package without any apparent restriction to a specific product (FF4 & FF8).

Furthermore, even were the '521 patent in a different field of endeavor from the claimed invention (shaving/hair formulations versus wound gels), it would still be reasonably pertinent – and therefore analogous prior art – because the '521 patent describes the same general class of aerosol devices as in the claimed invention and the devices perform the same

function in dispensing product. *Wyers*, 616 F.3d at 1237. Consequently, the skilled worker, seeking to deliver a wound gel by aerosol – as taught by the '223 patent (Ans. 5; FF9) – would have considered the aerosol of the '521 patent relevant to the problem addressed by the claimed invention.

For the reasons stated above and those set forth in the Examiner's Answer, we affirm the rejection of claim 5. Claims 6, 8-10, 14, 15, and 18-20 were not separately argued and therefore fall with claim 5. 37 C.F.R. § 41.37(c)(1)(vii).

TIME PERIOD FOR RESPONSE

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a).

AFFIRMED

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